

#### Members

Sen. Brent Steele, Chairperson  
Sen. Richard Bray  
Sen. Lindel Hume  
Sen. James Arnold  
Rep. Linda Lawson  
Rep. Sheila Klinker  
Rep. Ralph Foley  
Rep. Bruce Borders  
Ed G. Buss  
Steve Johnson  
Hon. Randall T. Shepard  
Larry Landis  
Neil Moore  
R. Todd McCormack  
Sheila Hudson  
Hon. Frances Gull  
Hon. James Humphrey  
Hon. Roger Duvall  
Hon. Lynn Murray  
Dr. Stephen Ross



## SENTENCING POLICY STUDY COMMITTEE

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Authority: P.L. 216-2007

### MEETING MINUTES<sup>1</sup>

**Meeting Date:** September 24, 2009  
**Meeting Time:** 1:30 P.M.  
**Meeting Place:** State House, 200 W. Washington St.,  
Room 431  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 1

**Members Present:** Sen. Brent Steele, Chairperson; Sen. Richard Bray; Sen. Lindel Hume; Sen. James Arnold; Rep. Sheila Klinker; Rep. Ralph Foley; Rep. Bruce Borders; Ed G. Buss; Steve Johnson; Hon. Randall T. Shepard; Larry Landis; Neil Moore; R. Todd McCormack; Sheila Hudson; Hon. Frances Gull; Hon. Roger Duvall; Hon. Lynn Murray; Dr. Stephen Ross.

**Members Absent:** Rep. Linda Lawson; Hon. James Humphrey.

Sen. Steele called the meeting to order at 1:35 pm.

As the first item on the agenda, Sen. Steele reviewed the committee schedule (see Attachment A). He stated that those issues that were assigned by the Legislative Council will be addressed first by the Committee. The Committee will also vote on all proposals that are to be recommended to the General Assembly at the final meeting.

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

After member introductions, Sen. Steele reviewed the requests that were given to the Committee by the Legislative Council, the budget for the Committee, and the work schedule of the Committee.

Sen. Steele recognized Rep. Klinker to introduce the issue on the agenda, reforming Indiana's criminal justice system to address the needs of people with developmental disabilities (DD).

**Rep. Klinker** told the committee members that the issue of addressing the needs of persons with developmental disabilities has been examined in the past by the Developmental Disabilities Commission. She acknowledged the work of former state representative and former Hancock County Sheriff Nick Gulling for participating with the Developmental Disabilities Commission.

Rep. Klinker recalled that Lafayette and Tippecanoe County law enforcement established a Crisis Intervention Team (CIT) to deal with people with mental illnesses and developmental disabilities. She noted that this team trains law enforcement officers and school officials to know the signs of individuals with developmental disabilities, especially when they "lash out."

**Kim Dodson, Assistant Director of Arc of Indiana**, testified on behalf of John Dickerson, who could not attend the meeting. Ms. Dodson's prepared remarks are included in Attachment B.

Responding to questions, Ms. Dodson told Rep. Klinker that she did not know how many Crisis Intervention Teams exist across the state, but that Arc has local chapters that help establish them.

When Sen. Steele asked about the required training for police, staff counsel pointed out that state law currently requires six hours of training at the Law Enforcement Academy for new officers. Ms. Dobson stated that she supports mandatory continuing training for law enforcement.

Ms. Dobson, responding to questions from Sen. Bray, clarified her statistics on those with developmental disabilities in the prison system. She said that 5-10% of those in prison have a disability and that 90% of those are mildly disabled. She also said that while persons with developmental disabilities are responsible for their actions, they are often coerced or act without knowing the consequences of their actions. In response to a question from Rep. Borders, she defined developmental disability as having a low IQ and an inability to take care of one or more of specific personal needs. Judge Gull asked if this was the same definition of mentally retarded and Ms. Dobson said that it was, but that they no longer use that term.

**Steve Johnson of the Prosecuting Attorneys Council** distributed a letter from Bill Smith, Prosecuting Attorney of Decatur County (see Attachment C). He said that Mr. Smith is particularly qualified to comment on this issue because he has a family member with a developmental disability and because he has had extensive experience as a private attorney in representing persons with developmental disabilities in legal cases.

Mr. Johnson looked at developmentally disabled people from the perspective of criminal defendants and crime victims.

As criminal defendants, he said that prosecuting attorneys are often frustrated with the few alternatives and resources for persons with developmental disabilities when they are accused of or arrested for crimes. Mr. Johnson said that prosecuting attorneys support increasing the number of crisis intervention teams across Indiana. Mr. Johnson stated that, in most counties, no alternative to jail exists after developmentally disabled people have been arrested. Consequently, they are often housed with the general population, and the jail staff often are not trained to deal with them. He suggested that an alternative type of secured detention, similar to accommodations for juveniles, needs to be established.

Mr. Johnson also said that some similarities exist between mentally ill and developmentally disabled

populations. He stated that like mentally ill persons, individuals with developmental disabilities can be found incompetent to stand trial. But, unlike the mentally ill, individuals with developmental disabilities do not gain competency to stand trial through treatment. He suggested that it may be helpful to have a commitment procedure to address their specific needs.

As crime victims, people with developmental disabilities are often ineffective witnesses because they cannot effectively communicate about the crimes committed against them. Mr. Johnson pointed out that the reporting rate for crimes perpetrated on the developmentally disabled underrepresents the actual rate. He suggested that a possible solution would be a mandatory reporting statute for teachers and health care professionals such as the law that applies to children.

Mr. Johnson described two local initiatives that can assist persons with developmental disabilities when they have been victims of crimes. First, if the crime is reported, a community's sexual assault response team (SART) can help with the investigation. Second, child advocacy centers in Indiana have used a forensic interviewing technique called FindingWords to help the child victims recount crimes to assist in gathering evidence. This type of technique may be applicable for victims who are developmentally disabled.

Mr. Johnson also indicated that crimes committed by caretakers are difficult to prosecute if the accused does not plead guilty. Often a victim with developmental disabilities is not competent to qualify as a witness because they do not understand the oath, remember the incident, or are unable to communicate.

Finally, because of the protected persons statute, a forensic interview is allowed, but its admission into evidence can be contested by the defense. Also, if the victim testifies at trial, the Supreme Court has ruled that the taped testimony cannot be entered into evidence.

**Larry Landis, Executive Director, Public Defenders Council** told the committee members that public defenders often represent people with developmental disabilities. He indicated that because developmental disabilities are considered social stigmas, people with these disabilities tend to hide them. Consequently, it is sometimes difficult for public defenders to know whether their clients are just "difficult" rather than developmentally disabled.

Responding to questions from other committee members, Mr. Landis remarked that developmentally disabled and mentally ill people in particular have been transferred from the hospitals and institutions to correctional facilities, and it is inappropriate for many of these criminal defendants to be placed in criminal facilities. He also indicated that although some developmentally disabled persons who are convicted of violent and sex crimes may need to be confined, the problem is that we lack intermediate sanctions, like secure group homes, that might be more appropriate for some.

Sheila Hudson, Executive Director of the Allen County Community Corrections Program, indicated that the state needs to have a better method of identifying the number of offenders who are developmentally disabled who are in jails and prisons.

Randy Koester told the committee members that the Department of Correction's classification formula is being used to establish new categories to help identify these populations.

**Peter Bisbecos, Director of the Division of Disability and Rehabilitative Services** made the following points in his presentation to the committee.

First, persons who have a dual diagnosis of developmental disability and a mental illness are the most complex individuals to treat in the criminal justice system. And while the criminal justice

officials generally don't understand this group of people, Indiana is in a good position to make strides in this area.

Second, few, if any persons with developmental disabilities are generally well served by being in large institutions. He noted that as Indiana has closed all DD institutions and placed people from institutions in the community, DD staff observed that the amount of staffing and oversight required for DD persons in group homes and other settings diminished by 30% to 50% over a one-year period. He told the Committee that there is no longer a question in the practice of the DD world that institutions breed negative behavior in almost all people with DD. Once removed from the institution, people's behavior problems almost always diminish.

Third, most persons who have a combination of developmental disabilities and mental illnesses are not good fits for group homes because the level of practice is not yet where it should be and also because of the rules surrounding access to the community.

Finally, he cited the case of *Olmstead v. Zimring*, which ruled that two mentally disabled women in psychiatric isolation had to be moved to the least restrictive setting that was possible. He explained that *Olmstead* is a seminal case in disability rights law because it mandated the move away from institutions, and the court indicated that the state's experts have to agree that a person is appropriately served in the community. However, in establishing this civil right for people with developmental disabilities, it also specifies that the state is not obligated to place a dangerous person in the community who can't be served safely in a community setting.

**Rusty Goodpaster and Dave Younce, Indiana Law Enforcement Academy** described the law enforcement training course and told the Committee that they will distribute materials to the members. Lt. Younce indicated that of the six hours spent on persons with mental illnesses and developmental disabilities, three hours are concerned with mentally ill people and three hours are concerned with the developmentally disabled.

Mr. Goodpaster cautioned that mandating additional instruction would increase the costs of instruction to the Law Enforcement Academy and require local law enforcement agencies to pay overtime by substituting law enforcement officers on the street when additional time is mandated in training. He also indicated that the members of the training board wish to ensure that the local agencies have the flexibility to provide what they believe to be the programs that law enforcement officers need to effectively ensure public safety.

Mr. Goodpaster added that officers are mandated by statute to receive continuing education in interacting with persons with mental illness, addictive disorders, mental retardation, autism, and developmental disabilities.

Rep. Borders stated that it was important to ensure that training boards have flexibility in providing training for what the agency believes that law enforcement officers need.

There being no further business to conduct, Chairman Steele adjourned the meeting 3:14 pm.

Attachment A  
**Work Schedule for 2009 Sentencing Policy Study Committee**

| <u>Meeting Date</u>                                      | <u>Topics</u>                                                                                                                                                                                                                                                                                                               |
|----------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| October 1 <sup>st</sup><br>Senate Chambers,<br>1:30 p.m. | <p><b>Expunging the criminal record of a person who has been exonerated</b></p> <p>HB 1673-2009 (rehabilitation of long term inmates)</p> <p><b>Child solicitation, habitual offenders, interference with custody and non-support of a dependent</b></p> <p><b>Payment of claims from the Victims Compensation Fund</b></p> |
| October 15 <sup>th</sup><br>Room 431, 1:30 p.m.,         | <p><b>Evaluating whether the State should pay all trial costs in a prosecution for an offense committed at a state correctional institution</b></p>                                                                                                                                                                         |
| October 29 <sup>th</sup><br>Room 431, 10:00 a.m.         | <p>Presentation by the Indiana Sheriffs Association concerning new software to operate the Sex Offender Registry</p> <p>Data Oversight Commission</p> <p>Proposed Restrictions on Prepaid Cell Phones</p> <p>Other Issues</p> <p>Adoption of Final Report</p>                                                               |

note: items appearing in **bold** were charged by the Legislative Council

## Attachment B – Comments of Kim Dobson, Associate Executive Director of IARC

No one knows the exact number of people with intellectual, cognitive or other developmental disabilities in prison, jail or on probation or parole. Such statistics are not maintained for any of these populations, and only in prisons are there even rough estimates.

There has been a national trend over the last several years to begin looking at the populations within the nation's criminal justice systems to determine how many inmates have disabilities or mental illness and how those specific populations could be better served.

The prevalence of intellectual disabilities is 2% in the general population and somewhere from 5%-10% in the criminal justice system population. Why such a large population in the system?

I. Offenders with intellectual disabilities come disproportionately from low-income minority groups, where police presence and the probability of arrest are high.

II. Criminal justice system processing (from arrest through sentencing) usually proceeds without officials becoming aware of the offender's intellectual disability. Justice personnel are unfamiliar with how to recognize the condition, and offenders with mild intellectual disabilities are rather clever in masking their limitations.

III. Once arrested, offenders with intellectual disabilities are usually jailed during pretrial proceedings as they are unlikely to meet the criteria for personal recognizance or bail, since they are likely unemployed and often have few friends.

IV. Studies show that defendants with intellectual disabilities are more easily convicted and receive longer terms than offenders without disabilities receive. They confess more readily, provide more incriminating evidence to authorities and are less successful in plea bargaining.

V. Once incarcerated, the offender with an intellectual disability is often cruelly abused or victimized. Their response to threatening situations is more likely to be physical rather than verbal or intellectual, and their resulting institutional behavior is poor. As such, inmates with intellectual disabilities take up an inordinate amount of staff time, and many are eventually reclassified to be a higher and more expensive security level.

VI. Their poor institutional behavior and over classification means that they fail to earn maximum good time/work time credits, are unable to participate in early release programs, and where parole is available, fail to become parole eligible because they have not finished the programs required for parole consideration. The result is that offenders with intellectual disabilities serve a great portion of their court-imposed sentence than an offender without a disability.

VII. It is estimated that nearly 90% of persons with intellectual disabilities in prisons have a mild intellectual disability and are often able to hide their disability from those not trained to recognize it. They are often misperceived by justice officials as uncooperative or under the influence of drugs or alcohol when first becoming involved in the justice system. People with disabilities usually recognize a person of authority and

often times want to make them happy and receive a perception of acceptance. That is why when asked if they have done “something” they will use answer yes, whether it is true or not.

These situations do not result from the malice of justice system officials, but rather from the lack of knowledge and programs available.

Persons with intellectual disabilities have little long-term perspective and little ability to think in a casual way to understand the consequences of their actions. Some people with intellectual disabilities are unable to process danger itself which again makes them good victims of crimes. People with intellectual disabilities are usually followers and easily manipulated. People with intellectual disabilities tend to take whatever is stated at face value, not understanding that something may be going on behind the scenes. These characteristics open them up to manipulation and a high risk of victimization.

The Arc of Indiana believes that more appropriate training on identifying and handling situations with people with intellectual and other developmental disabilities is needed for all involved in the criminal justice system.

The Arc of Indiana also believes that people with disabilities who commit crimes should be held accountable for their actions and behavior. We support efforts that provide them with appropriate supports and services to make their experience with the criminal justice system fair and equitable. We would be interested in pursuing discussion regarding some type of diversion program for people with developmental disabilities where appropriate similar to diversion programs available to people with mental illnesses.

I apologize for the length of my testimony as I know you have several more people to present this afternoon. I felt it necessary to discuss with you some of the basic reasons why this is such an important issue for people with developmental disabilities.

Indiana has done a tremendous job closing its state-run institutions for people with disabilities and we have more people now than ever living in communities throughout our state. With this inclusion comes the opportunity for people to get involved in the criminal justice system.

I appreciate you putting this issue on your agenda today and I look forward to hearing other presenters.

## **Attachment C – Comments of Bill Smith, Office of Prosecuting Attorney, Decatur County**

Re: Sentencing Policy Study Commission -House Resolution 120

House Resolution 120 mixes unrelated issues under the subject matter of "developmental disabilities". In one part of the resolution, the subject matter is developmentally disabled persons as "victims". In another part, the subject matter is developmentally disabled persons as "defendants". These subjects are two very different and separate issues.

This memorandum speaks to the issue of developmentally disabled persons as defendants in criminal prosecutions and related sentencing.

### *What is Developmental Disability?*

*First, the term, "developmentally disabled" describes a broad category of people with very different disabilities. There are many different and diverse causes for developmental disability. The term, "developmentally disabled" is probably too vague for application to issues of criminal prosecution or sentencing.*

*Most developmentally disabled persons know the difference between "right" and "wrong". During the past thirty years, public and private efforts have created a system that enables developmentally disabled persons to enjoy daily living with appropriate skills and behavior. Almost all developmentally disabled persons conform their behavior to both socially and legally expected and accepted standards.*

### *Developing Acceptable Behavior*

*In Indiana, the system for developing acceptable behavior begins by a program that intervenes and works with the family in the early months of the disabled child's life. In about three years, the developmentally disabled child begins daily participation in special education classes in the public schools long before other children enroll. With special education and its inclusion programs, public schools do a good job in socializing the behavior of developmentally disabled children. They also do a good job in consciously training and conditioning the developmentally disabled to behave appropriately and obey rules.*

*In addition, private programs, like Special Olympics, are available to reinforce and continue this education process. In these programs, developmentally disabled learn that a skill or task must be performed under the rules of the game.*

*Once the developmentally disabled child becomes an adult, workshop programs, work adjustment programs and adult daily living programs continue the training the developmentally disabled in proper employment and adult social behavior.*

### *Sources of criminal Behavior*

*Criminal behavior in all persons, regardless of intellect, arises from an uncontrolled impulse or emotional need. Persons with high intellect have the same impulses and also commit crimes. The amount of intellect does not necessarily control behavior or impulse. Mere intellectual impairment does not cause criminal behavior, except in those so mentally retarded they cannot comprehend or develop daily living behavior.*

*Most of the criminal behavior of the developmentally disabled arises from the two sources. These are the same sources that cause criminal behavior in the normal population.*

*The first source is dysfunctional families where the developmental needs of disabled children are ignored. Parents made little effort to insure the disabled child participated in public school's special education programs. In these families, deviant behavior is frequent within the daily activities of the family. As a consequence, deviate behavior is simply imitated by the disabled child in daily life. This family behavior often includes abusive acts that are adopted by the disabled child as normal behavior. Within these families, normal*



*children frequently develop the same deviate or delinquent behavior.*

*The second source of this criminal problem arises when the developmentally disabled also has a mental illness. The mental or emotional illness creates an impulse that drives the developmentally disabled person towards deviant behavior. Mere intellectual impairment or mental retardation usually does not cause criminal behavior. Like persons with normal intelligence, crime is the result when the impulse of deviant behavior prevails over the intellect.*

*Unlawful sexual behavior by the developmentally handicapped is its own special and separate discussion. There are no public or private programs at any level to help or train the developmentally disabled in managing the natural sexual impulse. A very puritanical approach to sexual behavior is imposed upon the developmentally disabled. Understandably, this attitude of total sexual abstinence is imposed mostly to prevent the developmentally handicapped from having children. Rational programs that train the developmentally disabled in the management of sexual behavior might reduce some of the unlawful sexual misconduct by this population.*

#### *Sentencing the Developmentally Disabled*

*The thought of placing the burden of rehabilitation for the developmentally disabled as part of a criminal sentencing decision is misplaced, inappropriate, unfair and ineffective.*

*Indiana has no program of any kind at any level to address the issue of criminal behavior by the developmentally disabled, either before or after a crime is committed. The Indiana Department of Corrections has no program or facility for rehabilitating the developmentally disabled criminal. It is totally unreasonable to place a burden upon a sentencing court when it is being completely ignored by everyone else. Indiana's criminal justice system almost entirely places the burden for appropriately handling of crime by the developmentally disabled upon the prosecuting attorney. Most prosecutors are compassionate and use good judgment in prosecuting the developmentally disabled in spite of the public demand for harsh treatment for all criminals. However, any sentencing policy must recognize that conviction sentencing is almost completely based upon a large number of decisions made earlier by the prosecuting attorney.*

#### *Sentencing Decisions*

*Any sentencing policy concerning the developmentally disabled should be based upon a specialized analysis. If a developmentally disabled person is convicted of a crime, the sentencing court should review the likely source for the criminal conduct.*

*If the crime was committed entirely because of the defendant's low intellect, there are no viable sentencing options. The degree of mental retardation overwhelms the defendant's ability to rehabilitate. This is a lifetime condition and the defendant should be under the jurisdiction of an adult protective services program that hopefully can control the future of this defendant. Probation will not be effective, leaving criminal confinement as a pointless alternative.*

*2. If the crime was committed because of impulses or behavior arising from mental or emotional illness by a mentally retarded person, the court has a different sentencing option. Probation could be used to enforce medication and medical programs that reduce the impulses toward criminal conduct. If the probation is effective, then probation should transform into an adult protective services petition that continues the effective treatment. If the medication is necessary to control the impulse, criminal confinement or enforced training without such medication only delays the defendant's return to criminal behavior upon release.*

*3. If the crime was committed because the mentally retarded person's development and education was ignored or neglected, it will be very difficult for the court to impose an effective conviction sentence. Since there was no training during the person's development, there is little or no basis for establishing acceptable behavior. The developmentally disabled adult criminal cannot be sent back into the public special education system to develop appropriate social and legal behavior. The court cannot "unwring this bell" or "uncrack this egg" in this situation.*

*If the crime is a misdemeanor or the first felony conviction of the disabled person, probation could be used to*

*force this person to change his behavior in work adjustment and adult daily living programs. These programs might develop a basis for rehabilitation and lawful behavior. In these programs, the defendant will be given a fair opportunity but must soon develop acceptable behavior to remain in these programs. If the unacceptable behavior continues, the defendant will be expelled from the programs.*

*These ideas put most of the burden of rehabilitation upon the probation departments. However, Indiana has no probation programs specifically designed to work with the developmentally disabled defendant. If probation fails, the only alternative available in Indiana is criminal confinement. If the developmentally disabled person has the ability to become a repeat criminal offender, he has merged into population that enjoys criminal behavior. In Indiana, criminal confinement is the only alternative for containing entrenched criminal behavior.*

*The criminal law's definition of "mental disease or defect" is archaic and too crude to provide any guidance to the court when imposing a sentence upon a developmentally disabled person. Indiana has made no effort of any kind to provide any understanding or program for crimes committed by the developmentally disabled. It is wrong to place this burden of this rehabilitation the sentencing court without providing them with workable and effective alternatives.*

*William O. Smith Prosecuting Attorney Decatur County, Indiana*

*\* William O. Smith has been the elected prosecuting attorney in Decatur County for 23 years. He has been involved in advocacy for the developmentally disabled at many levels for the past 30 years. He has served on the board of directors of several advocacy groups and also as a board member and president of Developmental Services, Inc in Columbus, Indiana. He has an adult Down Syndrome daughter. Before he became a full time prosecutor in 2000, he maintained a private practice of law that included a significant practice involving developmentally disabled persons. His wife, Lynda is currently the president of the Decatur County ARC.*